IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23949-7-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
BARBARA A. MARTIN,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

BROWN, J.—Barbara A. Martin appeals her convictions for manufacturing controlled substances within a school bus zone and second degree criminal mistreatment. We accept the State's error concession in the criminal mistreatment conviction and reverse. We reject Ms. Martin's evidence insufficiency and misconduct claims for the manufacturing counts. Additionally, we reject her pro se ineffective assistance claim. Accordingly, we reverse in part, and affirm in part.

FACTS

Following complaints from neighbors of increased traffic and occasional strong odors, members of the Tri-City Metro Drug Task Force began surveillance on Ms.

Martin's home. About one year later, the task force executed a search warrant, finding Ms. Martin's minor child was in her bedroom. Officers found methamphetamine on a table inside the house, drying and growing marijuana plants, and a note in the kitchen addressed to Ms. Martin's boyfriend, Jimmie D. O'Hair. The note discussed missing drugs, sneaking to a nearby shed, and asked Mr. O'Hair to leave, telling him to "[c]lean up all the shit you've left . . . . Don't trash my house any more than you have." Report of Proceedings (RP) at 258. The evidence showed narcotics are often referred to as "shit." RP at 257.

In an outside garbage can, they found an empty bottle of HEET, acetone, plastic tubing, and acid. All of which are commonly used in the manufacture of methamphetamine. Additionally, a task force member located another note from Ms. Martin to Mr. O'Hair, discussing their drug activity and informing Mr. O'Hair that certain individuals "will never ask you to cook for them, your head gets too big." RP at 297. Mr. O'Hair was known to the task force as a "methamphetamine cook." RP at 302. Mr. O'Hair was seen leaving Ms. Martin's residence just prior to the warrant's execution. He was stopped within a half mile of the residence. The car contained an operating methamphetamine lab.

Outside the residence, the task force discovered a nylon bag, containing a black roll of electrical tape, lithium batteries, PVC piping, and glue sticks. They found muriatic acid in an abandoned vehicle on the property.

The task force searched a nearby shed, discovering more marijuana plants and a hole in the ground with a salty residue. Testimony showed the task force had been informed that methamphetamine lab waste was being dumped in the hole and the dumping was not unusual in methamphetamine production. Pursuant to a warrant, Officers searched a storage unit frequented by Ms. Martin and Mr. O'Hair, finding lithium metal, ammonium sulfate, a pressurized vessel for ammonia, coffee filters, mineral spirits, tubing, bags of marijuana, solvents, bottles of HEET, 13 blister packs of pseudoephedrine tablets, an air-purifying respirator, scales, and small baggies.

After the residence search was completed, the Benton-Franklin County Health District was called to the scene and posted the residence.

Ms. Martin was charged with manufacture of a controlled substance, methamphetamine; unlawful possession of a controlled substance, methamphetamine; manufacture of a controlled substance, marijuana; second degree criminal mistreatment; and bail jumping. The information contained a school bus zone allegation because Ms. Martin's home was near a school bus stop.

Mr. O'Hair testified for Ms. Martin, taking responsibility for manufacturing methamphetamine, but denying any manufacture at Ms. Martin's residence or shed.

The jury was instructed on accomplice liability. The "to convict" instruction for second degree criminal mistreatment solely required the jury to find Ms. Martin "recklessly created an imminent and substantial risk of death or great bodily harm to

[her daughter]." Clerk's Papers at 78 – Jury Instruction No. 17.

During closing remarks, the prosecutor argued, without objection, "He's dumping the stuff in the backyard. He didn't make the hole with the garden hose." RP at 718-19. He also argued Ms. Martin and Mr. O'Hair were "in it together" because "they're dealing." RP at 720. And, regarding chemical smells, "The smells are coming when Barb Martin is there and when Jimmy O'Hair was there. When they're each there alone." RP at 721. The prosecutor argued the residence "had been posted by the health department." RP at 756.

The jury found Ms. Martin guilty as charged, including a special finding methamphetamine was manufactured within 1,000 feet of a school bus route stop. After an unsuccessful motion for arrest of judgment or a new trial, she appealed the methamphetamine manufacture and criminal mistreatment convictions. During briefing on appeal the State conceded reversible error in the second degree criminal mistreatment under *State v. McGary*, 122 Wn. App. 308, 93 P.3d 941 (2004). We accept the concession because the charging document and instructions omitted the notice and proof that Ms. Martin recklessly created an imminent and substantial risk of death or great bodily harm by withholding any of the basic necessities of life.

ANALYSIS

A. Evidence Sufficiency

The issue is whether sufficient evidence exists to support Ms. Martin's

manufacture of methamphetamine conviction.

The test for evidence sufficiency is whether, after viewing the evidence and all reasonable inferences most favorably to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). We defer to the trier of fact to weigh the evidence and judge the credibility of the witnesses. *State v. Bryant,* 89 Wn. App. 857, 869, 950 P.2d 1004 (1998) (citing *State v. Hayes,* 81 Wn. App. 425, 430, 914 P.2d 788 (1996)). Both direct and circumstantial evidence can be used to establish guilt. *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). We treat the State's evidence and all reasonable inferences as true. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A person is guilty of manufacturing methamphetamine if he directly or indirectly produces, prepares, propagates, compounds, converts, or processes methamphetamine. RCW 69.50.101(p), .401(1). A person can "manufacture" methamphetamine without possessing the final product. *State v. Keena*, 121 Wn. App. 143, 148, 87 P.3d 1197 (2004). "[I]f the defendant had a combination of items that generally has no purpose other than the manufacture of methamphetamine, the evidence is sufficient to support reasonable inferences of 'preparation' and 'processing,' and thus of manufacture, even if the evidence does not show that the defendant had the completed drug." *Id.* at 148.

A person is guilty of a substantive crime as an accomplice if "[w]ith knowledge

that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3).

On Ms. Martin's property, the task force found bottles of HEET, acetone, plastic tubing, acid, electrical tape, lithium batteries, and PVC piping. Officers discovered a hole inside her shed with a salty residue. During the search of a storage unit connected to her, officers found lithium metal, ammonium sulfate, a pressurized vessel for ammonia, coffee filters, mineral spirits, tubing, solvents, more bottles of HEET, 13 blister packs of pseudoephedrine tablets, an air-purifying respirator, scales, and small baggies. Officers observed Mr. O'Hair, a known methamphetamine cook, leaving Ms. Martin's home shortly before execution of the search warrant. He was stopped within a half mile of the residence with an operating methamphetamine lab inside his car. The officers located two notes from Ms. Martin to Mr. O'Hair, discussing their drug activity.

Given the above, Ms. Martin's manufacturing methamphetamine conviction is amply supported by evidence. The jury could reasonably find Ms. Martin knew of, aided, and encouraged Mr. O'Hair's actions, thus incurring accomplice liability even if she did not directly cook methamphetamine. Mr. O'Hair's contrary explanations were for the jury to decide. *Bryant*, 89 Wn. App. at 869.

Ms. Martin challenges the school bus zone enhancement in the assignment of error section of her brief, but does not develop the argument in the argument section.

See Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986) (without argument or authority to support it, an assignment of error is waived). Nevertheless, sufficient evidence shows methamphetamine was manufactured at Ms. Martin's residence, and since it is undisputed her residence is located near a school bus stop, Ms. Martin's sentence properly contained a school bus zone enhancement.

B. Misconduct

The issue is whether Ms. Martin was denied a fair trial based on prosecutorial misconduct during closing argument. Specifically, she contends the prosecutor improperly equated dealing drugs with manufacturing drugs and misstated the facts regarding the hole in the ground inside the shed, chemical smells coming from Ms. Martin's home, and a health department's involvement in posting the house.

Ms. Martin did not object to the prosecutor's arguments below. A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill intentioned" that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). In determining whether the misconduct warrants reversal, we consider the prejudicial nature and the cumulative effect. *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Here, the prosecutor commented during closing remarks, "He's dumping the stuff in the backyard. He didn't make the hole with the garden hose." RP at 718-19. He also argued Ms. Martin and Mr. O'Hair were "in it together" because "they're dealing." RP at 720. Regarding chemical smells, the prosecutor stated, "The smells are coming when Barb Martin is there and when Jimmy O'Hair was there. When they're each there alone." RP at 721. The prosecutor stated the residence "had been posted by the health department." RP at 756.

We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may not make statements unsupported by the evidence and prejudicial to the defendant. *State v. Jones*, 71 Wn. App. 798, 808, 863 P.2d 85 (1993).

Contrary to Ms. Martin's assertion, the prosecutor did not equate dealing drugs with manufacturing drugs. His comments about dealing drugs went to his argument Ms. Martin and Mr. O'Hair were working together, which was supported by the evidence presented and went to Ms. Martin's accomplice liability. The evidence showed the salty residue in the hole found in the shed was consistent with dumping methamphetamine

waste product; strong, odd odors were reported coming from Ms. Martin's residence; and the house had been posted by the health department. None of these statements are so "flagrant and ill intentioned" that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *Russell*, 125 Wn.2d at 86.

C. Additional Grounds

As additional grounds for review, Ms. Martin makes several complaints against her trial attorney that we consider for ineffective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, a defendant must establish that (1) counsel's performance was deficient and (2) the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In making this determination, we presume the defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Representation is not deficient if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice is shown when a reasonable probability exists that, but for trial counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 687. To establish ineffective assistance, Ms. Martin must meet both prongs of the *Strickland* test. *Hendrickson*, 129 Wn.2d at 78.

Ms. Martin contends counsel (1) failed to show Ms. Martin's evidence before it was admitted at trial; (2) should have argued one of the notes from Ms. Martin to Mr.

O'Hair was found in the storage unit, not the kitchen; (3) started taking a new prescription; (4) failed to call several witnesses; including one who would have testified the drugs were his, (5) failed to make any objections during trial; and (6) failed to get Ms. Martin into drug court.

However, none of Ms. Martin's allegations are substantiated in the record. Defense counsel made several objections. Calling witnesses is normally considered a matter of legitimate trial tactics. Regarding the other issues, Ms. Martin's claims rest on matters outside the record and therefore cannot be considered on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Even assuming any of Ms. Martin's allegations amount to deficient performance, she fails to argue specific prejudice. Without both prongs of the *Strickland* test being satisfied, Ms. Martin's argument must fail. *Hendrickson*, 129 Wn.2d at 78.

Reversed in part; affirmed in part.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Schultheis, A.C.J.

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Kulik, J.